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The Union's Duty of Fair Representation: Fact or Fiction

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THE UNION'S DUTY OF FAIR REPRESENTATION — FACT OR FICTION

I. INTRODUCTION

The collective bargaining system is based on the subordination of the interests of the individual employees to the collective interests of all members of the bargaining unit.[1] The National Labor Relations Act has given the unions broad authority in negotiating and administering collective bargaining agreements.[2] However, the courts early recognized that the employee needs individual protection to counter this broad union authority. The doctrine of the union's duty of fair representation resulted.

Although the union's duty of fair representation was originally a judicially created doctrine, it was subsequently embraced by the National Labor Relations Board (NLRB).[3] Since jurisdiction over union activity is concurrent, no election of remedies is required and the union's breach of its duty of fair representation can result in suits in more than one forum.[4] Thus, today's aggrieved employee may either file a complaint with the NLRB or sue in state or federal court.

The duty of fair representation first evolved in the context of racial discrimination,[5] but the courts extended it to all phases of the collective bargaining process[6] and to such varied circumstances as plant mergers and retirement benefits.[7] But despite its broad scope in theory, the duty has often been more fiction than fact. In practice, the courts have balanced the necessity for individual protection from unfair union treatment against the need for union discretion within the collective bargaining system and have traditionally given greater weight to

1. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

2. *See* National Labor Relations Act, 29 U.S.C. § 159(a) (1970).

3. NLRB v. Miranda Fuel Co., 140 N.L.R.B. 181 (1962). *See* 386 U.S. at 182; Bartels v. Lithographers' Union No. One-P, 306 F. Supp. 1266 (S.D. N.Y. 1969).

4. *See* Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U. L. REV. 1096, 1131-41 (1974); (BNA), THE DEVELOPING LABOR LAW 743 (C. Morris ed. 1971).

5. *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

6. *See* Price v. Int'l Bhd. of Teamsters, 457 F.2d 605 (3rd Cir. 1972); Truck Drivers & Helpers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

7. *See* Nedd v. UMW, 400 F.2d 103 (3rd Cir. 1968).

the need for union discretion.[8] As a result, only flagrantly unfair behavior by unions has resulted in recovery for employees.[9] However, this conservative judicial application of the fair representation doctrine has now begun gradually to change. Both the United States Supreme Court and the Wisconsin court now recognize the necessity for protecting the workers' precarious position between the two giants of labor and management and have recently moved in the direction of establishing a negligence standard to determine breach of the duty of fair representation.[10] This comment will examine these recent developments in the judicial interpretation of the duty of fair representation.

II. SOURCES OF THE DUTY OF FAIR REPRESENTATION

Section 9(a) of the National Labor Relations Act establishes that the union is the exclusive representative for all employees within the bargaining unit, not just those voting for that particular labor organization.[11] As a result, a minority of workers may be antagonistic to their bargaining agent. Conversely, the union may disfavor some of the workers which it represents and may be tempted to represent them inadequately.

The entire system of collective bargaining is based on the subordination of the interests of the individual employee to the collective interests of all members of the bargaining unit. For example, the federal labor statutes vest the union with broad authority to negotiate and administer collective bargaining agreements while prohibiting the individual from bargaining for himself.[12]

The union's broad and pervasive statutory authority is not

8. *See* Note, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1120 (1973).

9. *See* Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee,* 8 SUFFOLK U. L. REV. 1096 (1974).

10. *See* text accompanying notes 79-87, *infra.*

11. The National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

12. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970); 386 U.S. at 182.

countered by any statutory protections for the individual rights of employees. Thus, the federal labor statutes place the individual worker in a precarious position, a position which became more perilous as the labor unions gained power and became less responsive to the needs of individual employees.[13] The courts recognized that these statutes left the individual worker without recourse against unfair union representation and filled the void by interpreting them to imply a duty of fair representation to protect individual rights.

The Supreme Court first recognized the union's duty of fair representation in the 1944 case of *Steele v. Louisville & Nashville Railroad.*[14] The Alabama Supreme Court had ruled that no remedy existed against a union guilty of racial discrimination. A unanimous Supreme Court reversed, finding that a fair interpretation of the statutory language of the Railway Labor Act would require the union to "represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."[15] In a companion case, the Supreme Court interpreted the National Labor Relations Act similarly to require a duty of fair representation.[16] The Court thus subjected all unions covered by the federal labor statutes to the judicially defined duty of fair representation and gave the employee a judicial remedy for any unfair partial or bad faith union conduct.

Eighteen years after the Supreme Court recognized a judicial remedy for unfair representation, the National Labor Relations Board recognized a parallel administrative remedy. In *Miranda Fuel Co.*[17] the Board ruled that unfair representation falls within the prohibitions of section 7 of the National Labor Relations Act.[18] According to the Board, section 7 "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."[19] Because section 8(b)(1)(a) makes

13. *See* Note, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1178 (1973).

14. 323 U.S. 192 (1944).

15. *Id.* at 204.

16. Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

17. 140 N.L.R.B. 181 (1962), *enforcement denied on other grounds,* 326 F.2d 172 (2d Cir. 1963).

18. *Id.* at 185.

19. *Id.*

a section 7 violation an unfair labor practice, *Miranda* made unfair representation by the union an unfair labor practice.

Thus, today's aggrieved employee may seek a remedy for unfair representation either through an administrative proceeding before the National Labor Relations Board, or through a suit in state or federal court. In either case the source of the remedy is not protective legislation, but rather judicial recognition of the need for some protection of individual rights within the collective bargaining system.

III. Historical Development of the Duty of Fair Representation

The fair representation doctrine began as a response to the union's authority over minority members of the unit. The early cases establishing the duty stressed the significance of the union's power of exclusive representation. The *Steele* decision was based on the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf . . . ."[20] Because the labor statutes vest a union with power over minority members, the Court required that this power be responsibly exercised.

Following *Steele,* the Court promptly broadened the basis for the fair representation doctrine from a concern for fairness to minority members of the unit to a more general recognition that the federal labor statutes cannot sanction discrimination and unfair treatment against any member of society. In 1952 the Supreme Court decided *Brotherhood of Railroad Trainmen v. Howard,*[21] in which a union discriminated against black train porters who were not members of that particular union. The union argued that its duty extended only to members of the Brotherhood and consequently, its statutory bargaining power could legitimately be exercised so as to abolish the jobs of these black train porters. The Court rejected this narrow construction of the fair representation doctrine, and ruled that unions cannot use "their position and power to destroy colored worker's jobs in order to bestow them on white workers. And courts can protect those threatened by such an unlawful use of

20. 323 U.S. at 198.
21. 343 U.S. 768 (1952).

power granted by a federal act."[22]

The Supreme Court's expansion of the justification for the duty of fair representation was accompanied by a broadening of the application of the rule. The duty was first recognized in the context of racial discrimination,[23] but in 1953 in *Ford Motor Co. v. Huffman,*[24] the Supreme Court applied the fair representation doctrine to a dispute over seniority credit given to new employees for time spent in the military, and restated the fair representation doctrine as a duty of "complete loyalty to, the interests of all whom [the union] represents."[24.1]

The significance of the *Huffman* decision is two-fold: First, the Court applied an old rule in a new factual setting. Previously the Court had spoken in negative terms restraining the union from certain types of behavior, but *Huffman* expressed the duty in terms of affirmative loyalty.[25] Second, the *Huffman* decision imposed a far-reaching limitation on the duty. The Court ruled that "[a] wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion" is required.[26] Thus, although *Huffman* expanded the duty beyond the racial discrimination context, it established the "wide range of reasonableness" limitation. This limitation reappeared in later years[27] and provided a strong counterbalance to the gradually expanding fair representation doctrine.

The increase in the power of the unions in the later fifties resulted in a recognition by the Supreme Court in *Conley v. Gibson*[28] of the need for further expansion of the fair representation doctrine. In that case, the petitioners were wrongfully discharged blacks who had been refused union aid in preparing their grievances. The union contended that its previously established duty to refrain from discriminatory conduct ended with the making of the agreement between union and employer. In rejecting this argument, the Court established the rule that "[t]he bargaining representative can no more un-

22. *Id.* at 774.
23. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).
24. 345 U.S. 330 (1953).
24.1. *Id.* at 338.
25. *Id.* at 330.
26. *Id.* at 338.
27. *See* text accompanying notes 35-37, *infra.*
28. 355 U.S. 41 (1957).

fairly discriminate in carrying out [the grievance process] than it can in negotiating a collective agreement."[29] As a result of *Conley,* courts applied the duty of fair representation to all phases of labor relations.[30] However, they applied a more rigorous standard at the negotiation stage,[31] thus recognizing the need for union discretion in the bargaining process. *Conley* established the existence of the duty of fair representation of post-negotiation stages. Later courts made the standard even more strict at these stages.[32]

Conley also introduced a due process analogy in fair representation cases. According to the Court, "[a] contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."[33] This analysis parallels constitutional due process analysis as applied to criminal statutes, which requires that the enforcement as well as the language of the statute be nondiscriminatory.[34] In a labor context this analogy results in examination of actual enforcement and impact rather than a cursory glance at the language of a union contract. Therefore, *Conley* requires fair representation in substance, not just in form.

In the early sixties, the Supreme Court's concern for balancing union power with protection of individual workers changed to a concern that too great a protection of individual rights would upset the collective bargaining system. This new concern was reflected in *Humphrey v. Moore*[35] where the Court emphasized the importance of giving the union discretion in the implementation of the grievance process: "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on not so frivolous disputes."[36] Based on this reason-

29. *Id.* at 46.

30. *See* Note, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1120 (1973).

31. *Id.*

32. *See generally* Blumrosen, *Union-Management Agreements Which Harm Others,* 10 J. PUB. L. 345 (1961).

33. 355 U.S. 41, 46 (1957).

34. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

35. 375 U.S. 335 (1964).

36. *Id.* at 349.

ing, the Court in *Humphrey* refused to provide a judicial remedy for the employee claiming inadequate representation of his grievance by the union. Lower courts also adopted this rationale for restricting the judicial remedies available to inadequately represented employees.[37] By the mid-sixties, the union's duty of fair representation had become more fiction than fact.

However, in 1967, the Supreme Court handed down the landmark decision of *Vaca v. Sipes*,[38] which qualified the principle of union discretion. In *Vaca* the union refused to take to arbitration an employee's claim that his employer had discharged him in violation of the labor agreement then in force. The employee then sued the union for breaching its duty of fair representation. The Court first restated the old maxim that an employee does not have "an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement,"[39] but then ruled that a union can neither ignore an employee's meritorious grievance nor process the grievance perfunctorily.

Vaca suggested the beginning of a new approach to the union's duty of fair representation. It recognized the necessity for union flexibility in bargaining situations but balanced this concern against the employee's need for a remedy from abuse of union power. The Court created a remedy with substance by explicitly setting the standard by which union conduct is measured. The Court ruled, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[40] This standard broadened the scope of the fair representation doctrine which had originally been limited to discriminatory and bad faith conduct. But although *Vaca* extended the proscription to "arbitrary" conduct, this nonspecific term created interpretational problems for the lower courts.

While universally recognizing that the use of the term "arbitrary" expanded the fair representation standard, the

37. *See, e.g.*, Smith v. DCA Food Industries, Inc., 269 F. Supp. 863 (D. Md. 1967); Berry v. Michigan Bell Tel. Co., 319 F. Supp. 401 (E.D. Mich. 1967).

38. 386 U.S. 171 (1967).

39. *Id.* at 191.

40. *Id.* at 190.

lower courts differed in interpreting the extent of the expansion. Some interpreted the three-pronged proscription of arbitrary, discriminatory or bad faith conduct as separate and independent tests.[41] For example, according to the Sixth Circuit, "[e]ach of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action."[42] However, decisions construing the *Vaca* standard as three independent tests were countered by a line of cases which continued to insist upon a showing of bad faith in every case.[43] These courts refused to see *Vaca* as a move in the direction of prohibiting negligent union representation, but held that the union must be guilty of some purposefully unfair act.

The conflicting interpretations of *Vaca* resulted in opposite results in factually similar cases. Some courts held unions to account for the failure to provide adequate procedural safeguards for employees.[44] Lack of adequate notice to a union member of the attempts to arbitrate a grievance could result in a finding of breach of the union's duty of fair representation.[45] Other courts required proof of the defendant union's bad faith.[46] Bad faith requires some degree of intent. Obviously, the addition of a mens rea requirement substantially changed the probability of successful prosecution of the charge. As a result, courts requiring proof of intent rarely found a breach of the duty of fair representation,[47] despite the Supreme Court's new definition of the standard in *Vaca.*

IV. Recent Supreme Court Interpretations Of the Fair Representation Doctrine

After four years of uncertainty created by the *Vaca* decision, the Supreme Court in 1971 handed down *Motor Coach Employees v. Lockridge.*[48] The plaintiff in *Lockridge* sought dam-

41. *See* Ruzicka v. Gen. Motors Corp., 523 F.2d 306 (6th Cir. 1975).

42. 523 F.2d at 310, citing Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1974). *See also* De Arroyo v. Sindicato De Traabaiadores Packinghouse, 425 F.2d 281 (1st Cir. 1970), *cert. denied,* 400 U.S. 877 (1970).

43. *See* cases cited at 44 Fordham L. Rev. 1062 n.15 (1976).

44. *Id.* at 1067.

45. *Id.* at 1066.

46. *Id.* at 1062 n.15.

47. *Id.*

48. 403 U.S. 274 (1971).

ages from the union for its part in causing his discharge pursuant to the union security clause in the collective bargaining agreement. This clause required as a condition of employment that Lockridge be a member of the union, but the union wrongfully construed it to require membership in good standing. As a result, the union caused the employer to discharge him because of his one month delinquency in payment of dues.

Although decided on other grounds,[49] *Lockridge* referred to the standard by which a duty of fair representation would be judged: "There must be 'substantial evidence of fraud, deceitful action or dishonest conduct'."[50] This requirement, taken from *Humphrey v. Moore*,[51] by its terms appears substantially more restrictive than the *Vaca* standard of "arbitrary, discriminatory, or bad faith" conduct. Nevertheless, since the *Lockridge* Court has quoted both the *Humphrey* and the *Vaca* standard, the Court may not have intended to retreat completely from the *Vaca* expansion of the fair representation standard.

However, *Lockridge* provided some indication of a retreat from the *Vaca* decision. For instance, in its discussion of the justifications for concurrent jurisdiction by both the National Labor Relations Board and the courts in fair representation suits, the Court stated that, "the fact that the doctrine . . . carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight."[52] The Court cited *Vaca* for this proposition, even though *Vaca* does not require such a severe limitation on fair representation suits. Thus, *Lockridge* appeared to transform the broad *Vaca* standard of arbitrary conduct into a rigid and narrow standard of intentional and severe union conduct. *Lockridge* cast doubt on lower court interpretations of *Vaca* which established a union's

49. The Court ruled that the case turned on a construction of the applicable union security clause which would fall under the exclusive jurisdiction of the National Labor Relations Board.

50. 403 U.S. at 299.

51. 375 U.S. 335 (1964).

52. 403 U.S. at 301.

duty to refrain from grossly negligent representation of its members.[53]

Finally, in 1976, the Supreme Court handed down *Hines v. Anchor Motor Freight,*[54] which clarifies the *Vaca* standard. The case involved a claim that the union's breach of the duty of fair representation tainted the grievance-arbitration procedures upholding the discharge of plaintiff employees. The Court ruled in favor of the plaintiffs, stating that "enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings."[55]

The *Hines* Court based its ruling in favor of the employees on an historical analysis of the development of the union's duty of fair representation. Significantly, the Court emphasized the broad language in *Vaca* and partially clarified the *Vaca* standard by suggesting the boundaries of permissible union conduct. Although the Court specifically allowed "mere errors in judgment," unions will not be permitted to leave employees "without jobs and without a fair opportunity to secure an adequate remedy."[56]

Hines demonstrated less deference to the collective bargaining process and more concern for protection of individual workers than previous fair representation cases. The Court applied a due process type of analysis to support a decision in favor of the employee. Procedural due process requires notice and an opportunity for a hearing appropriate to the case.[57] Similarly, the *Hines* Court found that redress beyond the grievance arbitration procedures was appropriate because of the substantial damage sustained by the employee. The Court mandated "an adequate mechanism to secure individual redress for *damaging* failure of the employer to abide by the contract."[58] Substantial deprivation was present in both *Vaca* and *Hines* since both cases involved an employee discharge and each case permitted redress for the employee. In accord with the due process con-

53. *See* cases cited at note 42, *supra.*
54. 424 U.S. 554 (1976).
55. *Id.* at 571.
56. *Id.*
57. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
58. 424 U.S. at 571 (emphasis added).

cept of "fundamental fairness," the *Hines* Court fashioned its rule to prevent "error and injustice of the grossest sort."[59]

"[E]rror and injustice of the grossest sort," in the words of the *Hines* Court, has often resulted when the individual employee is pitted against the economic giants of big business and big labor. The *Hines* Court implicitly recognized that all too frequently the fair representation doctrine offered scant protection for individual workers. Building on the landmark case of *Vaca, Hines* established a stricter standard of conduct in representing union members. *Vaca* proscribed arbitrary conduct, and *Hines* elaborated on that rule by imposing on the union the obligations of due process of law. In addition, by upholding a finding of breach of the duty of fair representation based on arbitrary union conduct, *Hines* supported those lower courts which have found a breach of the fair representation duty even in the absence of any bad faith.

The *Hines* decision follows naturally from the language in *Vaca.* Both decisions suggest the possibility that unions may be required to refrain from mere negligence in the representation of their members. In view of *Hines,* the earlier *Lockridge* decision is even more difficult to assess. However, the language in *Lockridge* suggesting that the *Vaca* standard requires bad faith was dicta. Since the *Hines* Court ignored completely the summary interpretation of *Vaca* in *Lockridge, Lockridge* is simply not controlling.

V. THE FAIR REPRESENTATION DOCTRINE IN THE WISCONSIN COURTS

In contrast to the Supreme Court in *Hines,* the Seventh Circuit and the Wisconsin district courts have taken a narrow view of the union's duty of fair representation.[60] A recent example of Seventh Circuit reasoning on the union's duty of fair representation is found in *Williams v. General Foods Corp.*[61] There the court held that the union's failure to protect female employees from discriminatory company policies was insuffi-

59. *Id.*

60. *See* Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972); Dwyer v. Climatrol Indus. Inc., 403 F. Supp. 683 (E.D. Wis. 1975); Mikelson v. Wis. Bridge & Iron Co., 359 F. Supp. 444 (W.D. Wis. 1973); Gottschling v. Square D Co., 301 F. Supp. 1349 (E.D. Wis. 1969).

61. 492 F.2d 399 (7th Cir. 1974).

cient to establish a breach of the fair representation duty. To justify this conclusion the court relied on the Second Circuit rule that "[s]omething akin to factual malice is necessary to establish a breach of the duty of fair representation."[62] However, it should be noted that *Williams* was decided after *Lockridge,* and thus its precedential value is limited.

In contrast to the conservative approach adopted thus far by the Seventh Circuit courts, the Wisconsin Supreme Court has shown a willingness to scrutinize closely an employee's complaint against the union. The best example of this position is *Clark v. Hein-Werner Corp.*[63] In this case the interests of two groups of empoyees within the bargaining unit were diametrically opposed. The union advocated the cause of one group in the arbitration, and the other group sued the union for a breach of the fair representation doctrine.

The Wisconsin court admitted that " '[t]he law upon this subject is still in a state of flux,' "[64] but adopted a broad standard labeled by commentators as the "fiduciary duty of fair representation." The Court applied this standard to the circumstances in *Clark* and found that "as a matter of law there has been no fair representation . . . even though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable to such a situation."[65]

This fiduciary standard which the Wisconsin court applied in 1959, is arguably stricter than the Supreme Court's 1964 standard in *Vaca.* Under the *Vaca* standard, the defendant union in *Clark* could have absolved itself of liability by showing the objective reasons for its decision to represent one faction over the other, but it could not do so under the *Clark* rationale.

In *Clark* the Court concluded that the group of employees whose cause was not supported by the union should be allowed to intervene in the arbitration proceeding. The court reasoned

62. *Id.* at 405, *quoting* Jackson v. Trans World Airlines, Inc., 457 F.2d 202, 204 (2nd Cir. 1972).

63. 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *rehearing denied,* 8 Wis. 2d 277, 100 N.W.2d 317 (1960).

64. *Id.* at 270, 99 N.W.2d at 135, *quoting* Donato v. Am. Locomotive Co., 283 App. Div. 410, 415, 127 N.Y.S.2d 709, 714, *aff'd,* 306 N.Y. 966, 120 N.E.2d 227 (1954).

65. 8 Wis. 2d at 272, 99 N.W.2d at 137.

that "where the substantial interests of the representative are not necessarily or even probably the same as those he purports to represent, due process militates vigorously against giving the decision effect upon them."[66] Thus, as early as 1959, the Wisconsin court used a due process analysis to decide a fair representation case.

Since the United States Supreme Court in *Conley* and in *Hines* also applied a due process type of analogy, it is likely that the Wisconsin court will continue to rely on the rationale of *Clark*. The *Clark* court based its due process analysis on the fact that seniority rights are "valuable property right[s],"[67] and found the requisite state action in a statute making it "an unfair labor practice not to carry out the arbitration clause of a collective-bargaining contract."[68] Therefore, due process requires an opportunity for a hearing untainted by the union's misconduct. Employees seeking to rely on *Clark* or *Hines* should be successful in cases involving substantial deprivations. Since the procedural requirements of due process vary with the gravity of the deprivation, greater safeguards should be required in discharge or seniority cases than in cases of less serious injury. Even though the requisite state action is not found in every case, the courts should follow the example of *Hines,* and apply a standard patterned on due process law.

The Wisconsin court's deference to the individual rights of employees was balanced by a recognition of the need to compromise. In a case decided the year after *Clark, Fray v. Meat Cutters Workmen Local 248,*[69] the Court emphasized the union's need for discretion in determining whether to present an employee's grievance: "In certain cases for the greater good of the members as a whole, some individual rights may have to be compromised."[70] Although *Fray* recognized that two interests are at odds in any claim by an employee against his union, the Court did not substantially change its earlier recognition that the union has a duty to protect individual rights.

The Wisconsin court's progressive attitude toward the duty of fair representation is shown again in the 1961 case of

66. *Id.* at 274, 99 N.W.2d at 138.
67. *Id.*
68. *Id.*
69. 9 Wis. 2d 631, 101 N.W.2d 782 (1960).
70. *Id.* at 641, 101 N.W.2d at 787.

O'Donnell v. Pabst Brewing Co.[71] The employees in this case were dissatisfied with their union's bargain regarding an integrated seniority list following a plant merger. The court upheld the union's conduct concluding that "hardships suffered by some were not the result of arbitrary or discriminatory treatment by respondents but were inherent in the very circumstances from which the problem arose."[72] But the dicta in the *O'Donnell* decision is more important than the conclusion. The case was decided six years before *Vaca,* but anticipated the Supreme Court's reasoning in stating that "[a]ctually, appellants make no charge in their argument here of bad faith, arbitrary, discriminatory, or capricious conduct on the part of respondents . . . ."[73] At a time when other courts required a hostile motive, the Wisconsin court implied that arbitrary or capricious conduct could be the basis for a breach of the duty of fair representation.

The Wisconsin court's liberal construction of the fair representation standard was again evident in the 1975 decision of *Mahnke v. Wisconsin Employment Relations Commission.*[74] *Mahnke* involved a union's refusal to arbitrate an employee's discharge. This refusal was based solely on economic reasons, but the court, nevertheless, found an insufficient basis for the decision not to arbitrate. The standard established by the court required that "such [a] decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration."[75]

The Wisconsin court has extended the duty of fair representation by giving it specificity. Most courts, including the Supreme Court, have set broad standards which are ineffective in many concrete cases.[76] In contrast, the Wisconsin court is willing to put teeth into general standards by demanding that the union take specific affirmative actions to fulfill its duty to the employee.

71. 12 Wis. 2d 491, 107 N.W.2d 484 (1961).
72. *Id.* at 502, 107 N.W.2d at 487.
73. *Id.*
74. 66 Wis. 2d 524, 225 N.W.2d 617 (1975).
75. *Id.* at 534, 225 N.W.2d at 626.
76. *See* text accompanying notes 38-47, *supra.*

VI. The Remaining Question — Is Common Law Negligence Enough To Breach The Duty Of Fair Representation?

Most courts agree that mere negligence on the part of the union does not establish a breach of the duty of fair representation.[77] However, some courts have come close to overturning this rule. The Fourth Circuit in *Griffin v. Automobile Workers* upheld a twelve thousand dollar verdict against a union on the grounds that "[w]ithout any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation . . . ."[78] The facts of *Griffin* reveal nothing more serious than the negligent handling of an employee's grievance concerning his discharge for fighting with a supervisor. The union first filed the employee's grievance with the supervisor who had been involved in the fight. According to the court, the grievance should have been filed with the depot manager.

The Sixth Circuit has been even more explicit in recognizing that negligent union acts may breach the duty of fair representation. *Ruzicka v. General Motors Corp.*[79] involved a union's failure to file a notice of unadjusted grievance that was necessary to commence arbitration. The court ruled that "[s]uch negligent handling of the grievance, unrelated as it was to the merits of Appellant's case, amounts to unfair representation."[80]

In contrast to the willingness of the Fourth and Sixth Circuits to find negligent breach of the duty, the Seventh Circuit has followed the Third Circuit and unequivocally ruled that "proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation."[81] These courts set a standard of care for unions which is substantially lower than the common law negligence standard of reasonably prudent conduct, and require "the plaintiff [to] show that the Union's conduct was intentional, invidious and directed at that particular employee."[82] Much is

77. *See* (BNA), The Developing Labor Law 153 (C. Morris ed. 1972).

78. 469 F.2d 181, 183 (4th Cir. 1972).

79. 523 F.2d 306 (6th Cir. 1975).

80. *Id.* at 310.

81. Cannon v. Consol. Freightways Corp., 524 F.2d 290, 294 (7th Cir. 1975), *quoting* Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970).

82. 524 F.2d at 293.

required of the plaintiff and little of the union. Even grossly negligent union conduct is allowed.

In contrast to the federal courts, the Wisconsin court has set strict standards of employee representation. When the evolution of the doctrine of fair representation was still in its early stages, this court recognized the "possibility of an action by an injured member of a union against the union . . . arising out of the negligence of union officers or agents in the representation of the injured member in a grievance against the employer."[83]

Courts other than the Wisconsin Supreme Court have intimated that a union breach of the duty of fair representation might be based on negligence. The Ninth Circuit has ruled that "'the *Vaca* opinion's repeated reference to "arbitrary" union conduct reflects a calculated broadening of the fair representation standard.'"[84] But the question remains whether this "broadening" referred to by the Ninth Circuit is great enough to cover negligent acts. One recent decision has ruled that conduct which would fit under the common law definition of "gross negligence" is sufficient to show a fair representation breach.[85] In that case, the Oregon Supreme Court established the applicable test as "conduct that [is] reckless, irresponsible and capricious to the extent of being arbitrary."[86] On this basis the court upheld a jury verdict that the union breached its duty of fair representation by ordering an employee to stop work when the work stoppage caused the employee's discharge. The court held that in exercising bad judgment amounting to gross negligence, the union breached its duty to the employees.

The next step in the judicial expansion of the doctrine of fair representation for many courts may be to follow the Oregon court and hold grossly negligent conduct a breach of the duty. But, since gross negligence has proved difficult to distinguish from common law negligence,[87] the courts may inevitably adopt a simple negligence standard requiring unions to exercise rea-

83. Fray v. Meat Cutters Workmen Local 248, 9 Wis. 2d 631, 640, 101 N.W.2d 782, 789 (1960).

84. Beriault v. Local 40, Int'l Long Shoremen's Union, 501 F.2d 258, 265-66 (9th Cir. 1974), *quoting* Retana v. Apartment Operators Local 14, 453 F.2d 1018, 1023 n.8 (1972).

85. Wheeler v. Woodworkers, 92 L.R.R.M. 2332, 2336 (Ore. Sup. Ct. 1976).

86. *Id.*

87. *See* generally Comment 37 MARQ. L. REV. 334 (1954).

sonable care in the representation of their members. The recent Supreme Court ruling in *Hines* is a step in this direction, and the Wisconsin court would certainly not hesitate to expand the rule if confronted with the proper case.

Some commentators have suggested that any expansion of the union's duty of fair representation should be accompanied by a distinction between procedural negligence and substantive negligence, and that unions be held to the negligence standard only in cases of procedural negligence.[88] This distinction in types of negligent union conduct is supported by the view that in order to give unions full scope to represent their members, public policy may require that they be insulated from liability for the negligent determination of discretionary matters.[89] In contrast, the rights of all the members of the collective bargaining unit will not be strengthened by allowing a union to escape liability for its negligent failure to follow required procedure.

A broad duty of fair representation may necessarily evolve in cases of procedural negligence, since the need for a stricter standard for union behavior is great and few countervailing reasons for broad union discretion exist. However, the standard which governs cases involving substantive negligence in the exercise of union discretion are more difficult to assess. This writer does not believe that the simple solution of insulating the unions from attack for substantive negligence is necessarily the best solution. The need to afford an actor with discretion in the exercise of his duties has not precluded the use of a negligence standard in other areas of tort law.[90]

The federal labor statutes have placed the individual employee in a precarious and often unprotected position between the economic giants of labor and management. The courts have recognized the necessity for countering the union's broad statutory power with some protection for individual rights by imposing on the union a duty to fairly represent the employees. This duty, like most others, should be judged by a simple negligence standard. The recent federal and state decisions should result

88. *See, e.g.*, 44 FORDHAM L. REV. 1062 (1976).

89. *Id.* at 1067.

90. For example, the negligence standard has traditionally been applied to the judgment calls of physicians and attorneys. *See generally* W. PROSSER, LAW OF TORTS, (4th ed. 1971) § 32 at 161-66.

in a broader and more just application of the fair representation doctrine.

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